Federal Court Cour fédérale

Date: 20220421

Docket: IMM-2286-21

Citation: 2022 FC 584

Ottawa, Ontario, April 21, 2022

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

BERNADIN KOSSI BEN DJIKOUNOU
(AKA BERNADIN KOSSI MOHAMMED)
AYAWA AWUNO

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicants seek a writ of *mandamus* directing the Respondent to render a final decision in their family sponsorship application and an award of costs for the delay in processing the application.

[2] For the reasons that follow, the application is granted and costs are awarded in favour of the Applicants

II. **Background**

[3] The Applicants, Mr. Djikounou and his wife, Ms. Awuno, are from Togo. Mr. Djikounou had fled Togo and was living in a refugee camp in Ghana when they met there in 2008. He had by then applied for resettlement in Canada. The couple married a few months later. Mr. Djikounou landed in Canada as a permanent resident through the overseas refugee resettlement program. As he did not have the benefit of legal counsel, he did not add his new wife to his application before he landed. He is therefore barred from sponsoring his wife as a result of ss. 117(9)(d) and 125(1)(d) of the *Immigration and Refugee Protection Regulations,* SOR/2002-227 [*IRPR*]. As a result, sponsorship applications Mr. Djikounou filed in 2008 and 2010, again without counsel, were refused.

[4] The failure to declare Ms. Awuno has resulted in the separation of the couple for most of their married life. Ms. Awuno returned to and continued to reside in Togo. Mr. Djikounou remained in close communication with his wife and visited when he could. Two children have been born of the marriage, both of whom died in infancy from natural causes. Ms. Awuno is now approaching the end of her child-bearing years.

[5] On November 10, 2017, after retaining counsel, the Applicants submitted the family sponsorship application that is the subject of this judicial review. In the application, the Applicants requested a humanitarian and compassionate (H&C) exemption from ss. 117(9)(d)

and 125(1)(d) of the *IRPR*. On April 9, 2018, six months later, Mr. Djikounou was again informed by the Respondent's department that he was ineligible to sponsor Ms. Awuno on account of s 117(9)(d). Which, of course, they already knew. He was informed that the application would be forwarded to the visa office in Accra, Ghana and continued on H&C grounds. Which was what had been requested in the application.

[6] On July 5, 2019, the Minister created a policy to exempt certain individuals from ss. 117(9)(d) and 125(1)(d). The policy was to be in effect from September 9, 2019 until September 9, 2021, and applied to applications that were pending as of May 31, 2019. The Applicants wrote to the visa office twice in July 2019 – shortly after the death of their second child – requesting that a decision be rendered given this new policy.

[7] In October 2019, the Respondent's Department (IRCC) requested further documents to establish the genuineness of the Applicants' relationship. The record does not disclose why that was in question. The Applicants provided documents in November 2019. The Applicants subsequently submitted four more requests that their application be processed: in June, August, and November of 2020, and in March 2021. Other requests for status reports were made repeatedly by the office of Mr. Djikounou's Member of Parliament. The last direct response received from the visa office was in February, 2020, which stated the application was in queue for review and no further action was necessary. This followed a decision by a visa officer, recorded in the Global Case Management System (GCMS) notes, that an interview with Ms. Awuno would be required. That decision was not communicated to the Applicants. Nor was any

fairness letter sent to outline any concerns that the officer might have and to invite a response from the Applicants.

[8] Shortly after that February 2020 communication, the border between Togo and Ghana was closed due to the global pandemic. The affidavit evidence of an official at the High Commission of Canada in Accra is that in-person interviews for applicants living in Ghana were only resumed in August 2021. The High Commission had apparently previously been able to conduct virtual interviews in Ghana with the assistance of a non-governmental organization. They were unable to make arrangements with similar organizations in Togo.

[9] The filing of this *mandamus* application in April 2021 appears to have prompted some attention to the file from the High Commission. The official responsible for processing permanent resident applications made an affidavit, dated June 26, 2021, which asserted that rendering a decision was dependent on a complete review including an interview with Ms. Awuno. A letter sent to the applicants in September, 2021 requested information which, according to the record, had been provided as early as 2018. The official's second affidavit dated October 5, 2021 states that Ms. Awuno could fly to Ghana for an interview at the High Commission.. That option was not previously communicated to the Applicants. The interview has since taken place. As of the date of the hearing, five months after the interview, the Applicants had yet to receive an answer.

III. **Issues**

[10] The issues in this application are whether a writ of *mandamus* directing the Respondent to process the application for family sponsorship on H&C grounds is justified having regard to excessive delay, and if so, whether costs should be awarded.

IV. **Analysis**

[11] The jurisdiction of the Federal Court with respect to the issuance of a writ of *mandamus* is set out in section 18(1) of the *Federal Courts Act*, RSC, 1985, c F-7.

[12] The test for whether *mandamus* shall issue is that outlined in *Apotex Inc v Canada (Attorney General),* 1993 CanLII 3004 (FCA). Considering that test, the only issue that appears to be in dispute between the parties is whether there has been an unreasonable delay.

[13] For a delay to be unreasonable, three requirements must be met:

1. The delay has been longer than the nature of the process required, *prima facie*;
2. The applicant and his counsel are not responsible for the delay; and,
3. The authority responsible for the delay has not provided satisfactory justification (*Conille v Canada (Minister of Citizenship and Immigration),* [1998] FCJ No 1553 at para 23; *Thomas v Canada (Public Safety and Emergency Preparedness),* 2020 FC 164 at para 19).

[14] The Court is conscious of the fact that the pandemic interrupted many of the normal processes of government, including the review of spousal sponsorship applications. The Court is also aware that these difficulties were heightened in regions that lacked the infrastructure and resources available in more developed parts of the world, which allowed for services to be continued online and through virtual communications.

[15] The Respondent submits that virtual interviews were not available in this instance as the High Commission did not have the technological capacity to conduct them for applicants in the region. However, it seems that no attempt was made to conduct family class sponsorship interviews by telephone. The Respondent submits that it would be inappropriate to assess the genuineness of relationships by phone. I accept that in most cases that may well be correct. But difficult circumstances, such as the pandemic, require adaptability. And, as the Applicants note, immigration detention and review proceedings which involve the liberty of the individual have been found to be acceptable to proceed over the phone. They argue, and the Court agrees, that it is not consistent with the objectives of *IRPA* to continue to process applications from Western countries while applications in Ghana were left to languish.

[16] The Court has issued *mandamus* in the context of the COVID-19 pandemic. In *Almuhtadi v Canada (Citizenship and Immigration),* 2021 FC 712 [*Almuhtadi*], Justice Ahmed held that a delay of over 4 years to process a permanent residence application for Convention refugees was unreasonable. The Minister argued the COVID-19 pandemic had affected government operations and processing applications. Justice Ahmed found the COVID-19 pandemic did not fully explain the IRCC delay, stating:

> As noted by the Applicants, this reasoning is not applicable for the period leading up to March 2020, approximately 3.5 years after the Applicants submitted their application for permanent residency. In the absence of evidence to the contrary, COVID-19 also does not negate the Respondents' decision-making capacity for the entirety of time subsequent to March 2020. The pandemic was undoubtedly disruptive, but governmental processes have slowly resumed and decisions are being made (at para 47).

[17] Similarly, in *Bidgoly v Canada (Citizenship and Immigration),* 2022 FC 283, Justice Favel held that a delay of 3.5 years to process a permanent residence application under the express entry program was unreasonable. The Respondent argued the delay was justified given the pandemic's impact on the government's ability to make prompt security assessments. Justice Favel wrote:

> Without more information, I do not find the Pandemic to be a satisfactory justification […] In this case, there was already a delay of 19 months by March 2020. The delay was already unreasonable by the time the Pandemic began in March 2020 (at para 40).

[18] In the present matter, the Applicants had submitted their application in November 2017, almost 2.5 years before the onset of the pandemic. Further, while the Respondent's affidavit evidence states that in-person interviews resumed in Ghana in August 2021, and that Ms. Awuno was free to fly there for an in-person interview, there is no evidence this was communicated to the Applicants until the October 5, 2021 affidavit was filed. Moreover, as of the date of the filing of this application for judicial review in April 2021, the Applicants had not received any substantive updates on their application since February 2020.

V. **Conclusion**

[19] From the very outset of the application for H&C consideration, officials reviewing the file seem to have ignored the information provided. This included the Applicants' acknowledgment at the outset that but-for the change in Ministerial policy, Mr. Djikounou would be ineligible to sponsor Ms. Awuno. Officials took several months to confirm and inform him of that fact which seems to have been unnecessary. It is difficult to understand, on the basis of the record before the Court, why officials may then have doubted that the relationship was not genuine given the substantial evidence submitted by the Applicants. High Commission officials then misled the Applicants, perhaps inadvertently, by informing them that the application was in the queue for review and that no action was required, but then failing to disclose that an interview was required.

[20] In the result, I am satisfied that the delay in this matter is unreasonable and that *mandamus* should be issued.

[21] No questions were proposed for certification.

VI. **Costs**

[22] The Applicants' request costs in the amount of $4,500. They rely on *Ben-Musa v Canada (Minister of Citizenship and Immigration)*, 2005 FC 764 where costs were awarded (calculated in accordance with Tariff B) after a delay of 4 years in processing a permanent residence application. Costs were also awarded in *Almuhtadi* in the amount of $1,500 because of the

extended delay of over 4 years and the failure of the Respondent to explain the reasons for the delay.

[23] As provided in s. 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, special reasons are required to award costs in immigration and refugee matters. While each case turns on its own particular circumstances, the threshold for establishing the existence of special reasons is high. A finding that *mandamus* is warranted is not, in itself, sufficient to justify the award of costs. Something more than mere slowness in processing is required such as conduct that is unfair, oppressive, improper or actuated by bad faith: *Subaharan v Canada (Minister of Citizenship and Immigration)* 2008 FC 1228 at paras 19-20.

[24] In the present matter, I am not prepared to find that the conduct of the High Commission officials was oppressive or actuated by bad faith given the volume of work they must deal with and the conditions imposed by the pandemic. However, I am satisfied that there was a degree of unfairness in the handling of the file particularly with respect to the failure to advise the Applicants that there were questions about their relationship that required an interview. As a result, I am prepared to award costs on the normal scale to the Applicants.

[25] The Court was advised that counsel represented the Applicants on a *pro bono* basis. However, that should not disqualify the Applicants from an award of costs having regard to the principles expressed by the Ontario Court of Appeal in *1465778 Ontario Inc v 1122077 Ontario*

Ltd, 2006 CanLII 35819 at para 34-35 and adopted by this Court in *Adbelrazik v Canada (Foreign Affairs and International Trade Canada)*, 2009 FC 816 at para 31 [*Adbelrazik*].

[26] I take note of the caution stated by Justice Zinn at para 32 of *Adbelrazik* that costs awarded to a party should not result in a windfall where the party has incurred no costs. In the result, I will order that the award will be dependent upon counsel for the Applicants completing and filing a Bill of Costs to be assessed in accordance with Tariff B. In the alternative, the parties may agree on a fixed amount to cover counsel's time and expenses in representing the Applicants. While costs awarded by the Court belong to the party and not counsel, this order is made on the assumption that it will not result in a windfall for the Applicants.

JUDGMENT IN IMM-2286-21

THIS COURT'S JUDGMENT is that:

1. The application for *mandamus* is granted;

2. If the Respondent continues to have concerns about the application a fairness letter shall be provided to the Applicants within 30 days of the date of this Judgment and Reasons and the Applicants shall have 30 days from receipt thereof in which to respond to the fairness letter;

3. Absent any concerns about the application, the remaining steps in the process shall be completed and a final decision rendered on the application within 60 days of the date of this Judgment and Reasons;

4. No serious questions of general importance are certified;

5. Costs are awarded to the Applicants on the normal scale as set out in the Court's Reasons;

6. The Parties may agree on a fixed amount to cover the Applicants' legal costs and disbursements.

"Richard G. Mosley"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2286-21
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